

89-840

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Supreme Court, U.S.

FILED

NOV 3 1989

JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1989

Melvin B. Pulliam,

Petitioner,

v.

United States of America,

Respondent.

PETITION FOR CERTIORARI - CRIMINAL CASE

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PETITION FOR CERTIORARI - CRIMINAL CASE

QUESTIONS PRESENTED FOR REVIEW

Did the District Court err in denying Pulliam bail pending appeal?

Is 18 U.S.C. §3143(b) constitutional?

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OPINION BELOW

This opinion of the Court of Appeals below (Appendix 1) was not reported.

JURISDICTION

The judgment of the Court below denying release pending appeal (Appendix 1) was entered on September 5, 1989, rehearing was not sought.¹ The jurisdiction of this Court is invoked under 28 U.S.C. §1254(i).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Eighth Amendment, United States Constitution which provides:

Excessive bail shall not
be required, nor excessive
fines imposed, nor cruel

¹ LIST OF ALL PARTIES

The parties to this action are: Melvin B. Pulliam represented by Thomas G. Ferguson, Jr. and Danny R. Deaver and the United States of America represented by United States Attorney Timothy Leonard and Assistant United States Attorney Nancy Jones

and unusual punishments
inflicted.

2. The Statute under which Petitioner
sought bail pending appeal but was denied
provides as follows:

(b) Release or detention pending
appeal by the defendant. -- The
judicial officer shall order that a
person who has been found guilty of
an offense and sentenced to a term of
imprisonment, and who has filed an
appeal or a petition for a writ of
certiorari, be detained, unless the
judicial officer finds--

(1) by clear and
convincing evidence that
the person is not likely
to flee or pose a danger to
the safety of any other
person or the community if
released under section
3142(b) or (c) of this
title: and

(2) that the appeal is
not for the purpose of
delay and raises a
substantial question of
law or fact likely to
result in--

(A) reversal,
(B) an order for a new trial,
(C) a sentence that does not
include a term of imprisonment

or

(D) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title, except that in the circumstance described in paragraph (b)(2)(D), the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

A. Course of Proceedings.

1. On December 15, 1989, in a cause then pending in the United States District Court for the Western District of Oklahoma, entitled United States of America v. Melvin B. Pulliam, CR 88-192-T, Petitioner, was found guilty by a jury of an indictment of seventeen counts charging violations of 18 U.S.C. §§371, 1006, 2, 657, 1344 and 1623(a). Jurisdiction below was founded upon the alleged violation of federal criminal statutes.

2. On March 30, 1989, the District Court entered judgment and Petitioner was sentenced to five years imprisonment on

each of counts one (1) through sixteen (16) to run concurrently and sixteen months on count seventeen (17) also to run concurrently and fined \$10,000 on Count seventeen (17). Petitioner was directed to report to the Federal Correctional Facility in El Reno, Oklahoma on May 15, 1989. This judgment and sentence is currently on appeal to the United States Court of Appeals for the Tenth Circuit (No. 89-6121).

3. On April 14, 1989, Petitioner filed a Motion in District Court for Release Pending Appeal. On May 4, 1989, the District Court denied that request (Appendix 2). On May 11, 1989, Petitioner filed his Application for Stay of Proceedings Pending Appeal and an emergency Motion for Stay of Execution of the sentence imposed by the District Court.

That Application was denied without prejudice to further consideration after the filing of briefs (Appendix 3). Petitioner's appeal of the District Court's denial of bail pending appeal was ultimately denied by the United States Court of Appeals for the Tenth Circuit on September 5, 1989 (Appendix 1).

5. Subsequently, on October 11, 1989, Petitioner requested that the District Court conduct an evidentiary hearing concerning whether he constituted a "threat to the community" which was denied on October 20, 1989 (Appendix 4).

B. Relevant Facts Concerning Request For Bail Pending Appeal.

1. Petitioner is a sixty-four (64) year old gentlemen with no previous criminal record. He is currently incarcerated in the Federal Prison Camp at El Reno, Oklahoma. As indicated above, an

appeal of his underlying conviction has been filed. Pulliam's brief with the Circuit Court has been filed, however, to date the government's response brief has not been filed. Petitioner asserts that he presented an adequate basis for release pending appeal and more importantly that the application of 18 U.S.C. §3143(b) to the facts of this case is an unconstitutional denial of bail and permits the punishment by imprisonment of one not finally adjudicated guilty. As evidenced by the fact that as of this date, Pulliam has served more than five and one-half months of imprisonment of a conviction and sentence which is being appealed, the application of §3143(b) as made by the District Court is unconstitutional and in violation of the Eighth Amendment to the United States Constitution.

EXISTENCE OF JURISDICTION BELOW

Petitioner was convicted in the District Court for the Western District of Oklahoma. The underlying conviction and sentence are on appeal with the Court of Appeals for the Tenth Circuit. Your Petitioner seeks in this matter a review of the District Court's and the Circuit Court's denial of release pending appeal.

This Petition presents an opportunity for this Court to consider the application of 18 U.S.C. §3143(b). Petitioner raised this constitutional issue at each opportunity below, but was not successful. In fact the Circuit Court did not even address the issue.

The government in arguing against release of Pulliam pending appeal asserts that no constitutional right to bail exists. This Court has however adopted the

proposition that an appeal from a District Court's judgment of conviction in a criminal case is a matter of right. Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917, 918, 8 L.Ed. 2d 21 (1962). An appeal is therefore the final step in the adjudication of guilt. An appeal in this case has in fact been filed with the Circuit Court and is still in its initial briefing stage. Adopting the logic of Circuit Judge McKay in his dissent in United States v. Affleck, 765 F.2d 944 956 (1985), that the "full panoply of constitutional rights applies until the conclusion of the appeal" one must conclude that release pending appeal is a matter of right. Thus, Pulliam must be afforded his constitutional right to bail under the present circumstances. The application of §3143(b) as made by the District Court and

affirmed by the Circuit Court denies him that right.

Congress by enacting §3143(b) and by the application of that statute in the case at bar has effectively denied under almost any circumstances bail pending appeal. The government sought in the case below to denigrate reference to Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 1, (1951) made by your Petitioner by announcing that it applies only to pre-conviction bail. Stack v. Boyle stands for the basic proposition that any person arrested for a non-capital offense is entitled to bail. In the case at bar, the facts are that this is a non-capital offense and that Pulliam is a person who is not likely to flee. (His family resides in Oklahoma). The application of §3143(b) to his situation violates the Eighth Amendment by denying bail

to him on grounds totally unrelated to his likelihood of fleeing during his appeal. In fact the application of §3143 under the facts and circumstances of this case allows the punishment of Pulliam prior to the final determination of his guilt. The finding by the District Court which permitted the Defendant's release prior to trial where it apparently determined that he was neither likely to flee nor a danger to the community further serves as evidence that now he is being unconstitutionally denied bail and thus incarcerated solely as punishment. The proposition of denying bail as punishment is further reinforced by the legislative history associated with the Bail Reform Act (which included §3143(b)) wherein Congress stated that the deterrent effect of criminal law was undermined by the release of Defendants (such as Pulliam)

pending appeal. Senate Report No. 98-225, 98th Cong. 2d Sess (1984) U.S.Code Cong. and Admin. New 1984 p.3209. In effect Congress now punishes any one convicted irrespective of his appeal rights.

Both the statute and its application are punitive and thus violative of the Eighth Amendment and therefore must be found unconstitutional. In its objection to bail for Pulliam the government referred to the decision of the 8th Circuit Court of Appeals in United States v. Powell, 761 F.2d 1227 (1985) for the proposition that 28 U.S.C. §3143(b) is constitutional. A review of Powell will reveal little, if any, analysis of the application of §3143(b) under circumstances such as the case at bar and should not restrict this Court from making its own determination that to deny bail to the Defendant in this

case denies Petitioner a fundamental guarantee under the United States Constitution and acts as punishment prior to a final adjudication of guilt.

A further constitutional infirmity presented by the facts of the case at bar when §3143(b) is applied is the punishment of Pulliam by incarceration without the due process guarantees of the Fifth Amendment. This Court in Evitts v. Lucey, ____ U.S. ____, 105 S.Ct. 830, 83 L.Ed. 2d 281 (1985) recognized that where an appeal as a matter of right exists, which the Petitioner contends is the current state of federal criminal law, that the procedures for such an appeal must comply with the due process provisions of the constitution. Here that right is denied by application of §3143(b).

This infirmity is even more apparent when the process by which a trial court

must operate under §3143(b) is reviewed. As Chief Judge Brieant of the United States District Court for the Southern District of New York so aptly noted in his opinion in U.S. v. Galanis, 695 F.Supp 1565 (S.D. N.Y. 1988), the trial court is in effect called upon to be a "bookmaker" judge in reviewing and considering the merit of those items raised by the Defendant on appeal. In effect what §3143(b) requires a trial Judge to do before ever granting bail is to determine that a case which he or she has just completed the trial of is so filled with error that he or she will be reversed. What an untenable position!

In summation Petitioner asserts that contrary to the District Court's determination and the continued urging of the government, §3143 permits an unconstitutional denial of bail and to due

process, in the course of his appeal, and thereby subjects him to punishment prior to the final adjudication of his guilt of the offenses charged.

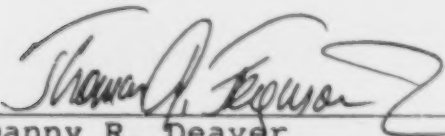
CONCLUSION

The denial of release pending appeal by application of 18 U.S.C. §3143(b) presents a clear violation of the Eighth Amendment to the United States Constitution. Various District Courts and Circuit Courts have wandered about in their application of this statute. In many cases it may be appropriate, but in a case such as the one at bar which involved many days of complex, technical and highly confusing evidence, the denial of bail pending appeal permits the punishment of one whose guilt has not been finally adjudicated. The clear infirmity of this statute, when held up to the standards of the Eighth Amendment, must

be addressed and therefore this Petition for a Writ of Certiorari should be granted. Following such examination your Petitioner would assert that the Court will conclude that he is entitled to be released pending his appeal.

Respectfully submitted,

KIMBALL, WILSON, WALKER & FERGUSON



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ATTORNEY FOR PETITIONER

APPENDIX

1. Order entered September 5, 1989 of the Tenth Circuit Court of Appeals in Case No. 89-6121.
2. Order of May 4, 1989, of the United States District Court for the Western District of Oklahoma in Case No. CR 88-192-T.
3. Ordered entered May 11, 1989 of the Tenth Circuit Court of Appeals in Case No. 89-6121.
4. Application and Order of October 11, 1989 and October 20, 1989 in Case No. CR 88-192-T.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,)
)
 Plaintiff-Appellee,)
)
v.) No. 89-6121
)
MELVIN B. PULLIAM,)
)
 Defendant-Appellant.)

ORDER

Before MOORE, SETH, and ANDERSON, Circuit
Judges.

This matter is before the court on defendant-appellant's motion to expedite consideration of an application for release pending appeal, which we treat as a renewed application for release following our order of May 12, 1989.

Upon consideration thereof, the Motion for release is denied for the reason that defendant failed to show by clear and

convincing evidence that he would not pose
a danger to the safety of the community if
released pending appeal.

Entered for the Court

ROBERT L. HOECKER, Clerk —

/S/

By Patrick Fisher —
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 -vs-) No. Cr.88-192-T
)
 MELVIN B. PULLIAM,)
)
 Defendant.)

ORDER

Defendant Pulliam has filed a Motion for Release Pending Appeal and a Brief in Support thereof. The defendant argues that there are substantial questions of fact and law likely to result in reversal. The defendant cites Title 18, U.S.C., §3143(b)(2) and United States v. Affleck, 765 F.2d 944 (10th Cir. 1985) in support of his claim. Defendant further argues that Section 3143 is unconstitutional, citing Stack v. Boyle, 342 U.S. 1 (1951). The government has filed a response in opposition to the motion. The defendant

has filed a reply to the government's response.

The Court is fully familiar with the procedural and factual background of this case having ruled on defendant's several pre-trial motions, having heard all of the evidence at trial, and having reviewed the Pre-Sentence Report and information presented by and on behalf of the defendant prior to sentencing.

Defendant Pulliam has failed to meet his burden to overcome the statutory presumption that he should be detained pending appeal pursuant to Title 18, U.S.C., §3143(b). Firstly, the Court finds that Defendant Pulliam has wholly failed to meet his burden on the issues of the substantiality of the questions on appeal and of the likelihood of a reversal or a new trial. The defendant has not provided the

Court with any issue on appeal that is framed with sufficient specificity that its "substantiality" can be assessed. All of his proposed issues on appeal are phrased as general statements with no reference to a particular error or to a portion of the record to support the questions he raises as required by United States v. Affleck, 765 F.2d 944, 954 (10th Cir. 1985). In this form, the issues on appeal cannot be said to be substantial. Likewise, the defendant cites no authority in support of any of the twelve issues on appeal to demonstrate that there is a "close question or one that could easily go the other way." Under the test set out in United States v. Affleck, the Court finds that the defendant has failed to meet his burden of proof, and therefore the Court denies the Motion to Release Pending Appeal pursuant to Title 18

U.S.C., §3143(b)(2).

Moreover, the Court finds the defendant's constitutional claim to be without merit. Section 3143(b) has been held to be constitutional. United States v. Powell, 761 F.2d 1227 (8th Cir.), cert. denied, 476 U.S. 1104 (1985). The Tenth Circuit has held that there is no constitutional right to bail pending appeal. United States v. Affleck, supra. at 948. The authority cited by the defendant in support of his position, Stack v. Boyle, 342 U.S. 1 (1951), is not controlling, as it addresses the question of whether bail is available post-arrest. Here the guilt of the defendant has been determined. The motion is denied on this basis.

Finally, the Court finds that the defendant has failed to meet his burden of proof under Title 18 U.S.C. §3143(b)(1).

While the defendant does not pose a flight risk, the evidence in the case established that he poses a danger to the community. The defendant was an active participant in a series of complicated frauds in which he utilized his knowledge, experience, expertise and position in the consumer loan field. One of his fraudulent schemes involved loans to individuals through entities that he controlled both before and after the dates of the crimes charged. Information provided to the Court by the Probation Office and the defendant at the time of sentencing demonstrated that Mr. Pulliam continues to be involved in the business entities previously utilized by him to perpetrate crimes. The Court finds that the defendant has not demonstrated by clear and convincing evidence that he does not continue to pose a danger to the

community as a result of his continued involvement in a field where he has previously devised schemes to manipulate transactions to his benefit. Pursuant to Title 18 U.S.C., P3143(b)(1), bail is denied.

IT IS SO ORDERED this 4th day of May, 1989.

/S/
RALPH G. THOMPSON, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,)
)
 Plaintiff-Appellee,)
)
v.) No. 89-6121
)
MELVIN B. PULLIAM,)
)
 Defendant-Appellant.)

ORDER

Before MOORE, SETH, and ANDERSON, Circuit
Judges.

This is a direct criminal appeal. The matter is before the court on defendant-appellant's "motion for release and motion for review or order denying bail pending appeal," filed May 8, 1989, and an emergency motion for stay of execution of sentence filed May 11, 1989. Upon consideration thereof the motion for stay of execution of sentence is denied.

This order is without prejudice to further consideration after the parties have filed their briefs and the special bail record has been lodged.

Entered for the Court

ROBERT L. HOECKER, Clerk

/S/

By Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 -vs-) No. Cr.88-192-T
)
 MELVIN B. PULLIAM,)
)
 Defendant.)

**MOTION TO ESTABLISH TIME FOR RELEASE ON
PAROLE, RENEWED MOTION FOR BAIL PENDING
APPEAL AND REQUEST FOR HEARING AND BRIEF IN
SUPPORT THEREOF**

COMES NOW the Defendant, Melvin B. Pulliam by counsel and respectfully moves the Court as follows:

1. For an Order of this Court pursuant to 18 U.S.C. §4205 establishing a time within which Pulliam shall be eligible for parole.

2. For an Order of this Court granting bail pending appeal.

3. For an Order of this Court setting this matter for evidentiary hearing on the

matters raised by this Motion.

In support of this Motion, Pulliam would show this Court as follows:

1. On December 15, 1988, Pulliam was convicted of all counts contained in the government's indictment.

2. On March 30, 1989, Pulliam was sentenced for five (5) years on each of Counts 1-16 to run concurrently, which were non-sentencing guideline offenses, and for 16 months on Count 17, which was a sentencing guideline offense, to run concurrently.

3. On May 15, 1989, Pulliam reported to the Federal Correctional Institute, El Reno Camp, El Reno, Oklahoma for incarceration.

4. Prior to reporting, Pulliam, by counsel, moved for an Order of this Court granting bail pending appeal which was

denied. That request was subsequently renewed by appeal to the Tenth Circuit Court of Appeals which was also denied on or about September 5, 1989 by Order of that Court indicating that no evidence that Pulliam was not a threat to the community was presented.

5. An appeal was filed by Pulliam in this case on April 6, 1989 and his Brief in Chief was filed August 21, 1989. The government has not filed its response brief and has been granted a thirty (30) days extension from September 28, 1989 within which to do so.

6. Within approximately the last thirty (30) days Pulliam has been advised by representatives of the Parole Commission that he will not be eligible for parole until after serving in excess of forty two (42) months of his sentence which appears

to be an effort to impose the sentencing process contained in the Guidelines to Sentencing (as promulgated by 28 U.S.C. §994(a)) to the sixteen pre-guideline offenses upon which Pulliam was sentenced.

7. 18 U.S.C. §4205 permits the Trial Court to establish a time for parole and further states that the term may be less than, but shall not be more than, one-third of the maximum sentence imposed by the Court.

WHEREFORE, Pulliam respectfully moves the Court for its Order granting an evidentiary hearing and following such hearing to establish a date for parole pursuant to 18 U.S.S. §4205 or in the alternative to grant bail pending appeal after determining that Pulliam does not represent a threat to the community.

Respectfully submitted,

**KIMBALL, WILSON, WALKER
& FERGUSON**

/s/

Thomas G. Ferguson, Jr., #2878
301 N.W. 63rd, Suite 400
Oklahoma City, OK 73116
(405) 843-8855
**ATTORNEY FOR DEFENDANT,
MELVIN B. PULLIAM**

CERTIFICATE OF MAILING

I hereby certify that on this 11th day of October, 1989, a true and correct copy of the above and foregoing instrument was mailed by regular United States mail with prepaid postage thereon, to:

Nancy S. Jones
William S. Price
4434 United States Courthouse
200 N.W. 4th Street
Oklahoma City, OK 73102

John B. Estes
Stipe, Gossett, Stipe, Harper,
Estes, McCune & Parks
P.O. Box 53567
Oklahoma City, OK 73152

/s/

Thomas G. Ferguson, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

OKLAHOMA CITY, OKLAHOMA

DATE: October 20, 1989

UNITED STATES OF AMERICA,)

Plaintiff(s),)

-vs-

) No. Cr.88-192-T

MELVIN B. PULLIAM,)

Defendant(s).)

TO: Clerk

Please enter the following minute order
in the above entitled case:

Defendant Pulliam has applied for
release on parole and request for hearing
on bail pending appeal. For the reasons
stated in the government's response
thereto, with which this Court agrees, the
application is in all of its parts denied.

/s/
UNITED STATES DISTRICT JUDGE

